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Recent Proposals and Legislative Efforts to Limit Three-Judge Court Jurisdiction

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Professor Jacoby suggests guidelines for a reorganization of the three-judge court system. He analyzes the comprehensive proposals submitted by the ALI and the attempts to enact these proposals into law. After reviewing specific instances where the jurisdiction of three-judge courts has been limited to date, the author concludes that future changes should be modeled after the Antitrust Procedures and Penalities Act.

I. INTRODUCTION

PROPOSALS TO CURTAIL federal jurisdiction have abounded in recent years. The reason is that the workload of the federal courts has continually expanded, not only because of added business resulting from a growing population, but also because of the substantial increase in federal criminal cases, habeas corpus, civil rights and, in some districts, securities litigation.[1]

The most comprehensive and far-reaching study of this problem within the last decades was the *Study of the Division of Jurisdiction between State and Federal Courts*, finally adopted by the American Law Institute in 1968, and published in 1969.[2] The Study was discussed in a series of articles,[3] sometimes encountering

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1. *See* (Chief Judge) H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15 (1973).

2. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (May 1968 Official Draft) [hereinafter cited as STUDY].

3. Burdick, *Diversity Jurisdiction Under the American Law Institute Proposals: Its Purpose and Effect on State and Federal Courts*, 48 N.D.L. REV. 1 (1971); Field, *Jurisdiction of Federal Courts—A Summary of American Law Institute Proposals*, 46 F.R.D. 141 (1969); Field, *Proposals on Federal Diversity Jurisdiction*, 17 S.C.L.

strong opposition.[4] The Study completely redrafted a substantial portion of Title 28 of the United States Code (Judicial Code). Here, we will be primarily concerned with the proposals to limit the institution of three-judge courts, but the Study, of course, had a much broader scope.

II. THE STUDY

The Study recommends a complete overhaul of the federal judicial system. While many of the Study's proposals would actually increase the federal workload,[5] several of them would result in a reduction. The largest decrease would probably be brought about by the proposal in the diversity field to bar a plaintiff from bringing suit in a federal court in his home state on the ground that his adversary is an out-of-stater.[6] Similarly, a business enterprise which maintained a "local establishment" in a state for over two years would be precluded from invoking federal diversity jurisdiction in any action arising out of the activities of that establishment.[7]

These proposals on diversity jurisdiction clearly are the most prominent provisions of the Study. Nevertheless, recent legislative events seem to indicate that another proposal may be of greater

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REV. 669 (1965); Fraser, *Proposed Revision of the Jurisdiction of the Federal District Courts*, 8 VALPARAISO L. REV. 189 (1974); Wright, *Federal Question Jurisdiction*, 17 S.C.L. REV. 660 (1965); Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185 (1969); Note, *Analysis of the ALI's Approach to the State-Federal Jurisdictional Dilemma*, 21 AM. U.L. REV. 287 (1972).

4. Currie, *The Federal Courts and the American Law Institute* (pts. 1-2), 36 U. CHI. L. REV. 1, 268 (1968-69); Farage, *Proposed Code Will Emasculate Diversity Jurisdiction*, 2 TRIAL, Apr.-May 1966, at 30; Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 S.C.L. REV. 677 (1965); Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE ST. L. REV. 317 (1967); Note, *ALI Proposals to Expand Federal Diversity Jurisdiction*, 48 MINN. L. REV. 1109 (1964).

5. Thus, proposed § 1312 of the Study permits removal when a federal defense or counterclaim is interposed, and proposed § 1311 of the Study, now 28 U.S.C. § 1331 (1970), abolishes the requirement of a particular amount in federal question cases. Both of these proposals would lead to an increase in the federal workload. Section 1311, in particular, would probably let certain types of welfare cases into the federal courts that are not presently admitted. In addition, proposed § 1304(b) of the Study would expand the diversity area by permitting an out-of-state defendant to remove the case even though he is joined with a non-diverse defendant or with a defendant not consenting to removal.

6. *Id.* § 1302(a); *cf. id.* § 1302(c). *See also id.*, Commentary app. B, at 468.

7. *Id.* § 1302(b); *id.* § 1302(b), Commentary, at 125-29; *see* Moore & Weckstein, *supra* note 4, at 14; *cf.* STUDY § 1302(c) (excluding the out-of-state commuter).

immediate significance. This one revolves around the proposed limitations on the use of three-judge courts. If some characterization is permitted, limiting proposals which deal with the "organization of the federal court system" seem to find easier acceptance than proposals which deal with "substantive limitations of federal jurisdiction."

The Study contains a detailed provision[8] dealing with the requirement of a three-judge court when an injunction or declaratory judgment is sought against a state officer on the ground that his acts are contrary to the Constitution of the United States. Unlike the interpretations given to present 28 U.S.C. section 2281 (1970),[9] proposed section 1374 would extend the three-judge requirement to declaratory judgments. Also, the language of proposed section 1374, which mandates a three-judge court whenever the state officer's acts or threatened acts are "taken under authority of a generally applicable State statute, administrative order, or constitutional provision"[10] and are contrary to the Constitution of the United States, would differ from the rule laid down in *Phillips v. United States*[11]

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8. STUDY § 1374.

9. Whatley v. Clark, 482 F.2d 1230 (5th Cir. 1973), *cert. denied*, 415 U.S. 934 (1974). In support of its affirmance of the district judge's refusal to convene a three-judge court, the *Whatley* opinion, 482 F.2d at 1231, cites Mitchell v. Donovan, 398 U.S. 427 (1970). *Mitchell* dealt with the refusal to empanel a three-judge court in a declaratory judgment pursuant to 28 U.S.C. § 2282 (1970). In any event, the Supreme Court has refused to assume jurisdiction in an appeal from a declaratory judgment of a three-judge court convened under 28 U.S.C. § 2281 (1970). *See* Perez v. Ledesma, 401 U.S. 82 (1970); Gunn v. University Comm. to End the War, 399 U.S. 383, 391 (1969) (White, J., concurring). At the same time, the Supreme Court has left the question of whether the three-judge court was properly convened to the appellate court within whose circuit the district court lay. Gernstein v. Coe, 417 U.S. 279 (1974); *cf.* Mitchell v. Donovan, *supra*; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154-55 (1963); Flemming v. Nestor, 363 U.S. 603, 606-07 (1960) (cases dealing with the comparable provision of § 2282). It should be noted that in 1910, at the time of the original enactment of the equivalent of § 2281, the remedy of declaratory judgments did not yet exist. The decision to subject declaratory judgment applications to the same three-judge requirement as injunctions was made by the American Law Institute because the same compliance is expected with a declaratory judgment as with an injunction and because both may be given res judicata effect. STUDY § 1374, Commentary, at 322-23. For a forceful reaffirmation of these principles, see the separate concurring opinion of Mr. Justice White in Steffel v. Thompson, 415 U.S. 452, 476 (1974), eloquently answering Mr. Justice Rehnquist's indecisive separate opinion in the case, *id.* at 478. *See* Comment, *Federal Courts, Declaratory Judgment*, 20 VILL. L. REV. 241, 253 (1974); Note, *Federal Jurisdiction—Steffel v. Thompson*, 6 LOYOLA U.L.J. 508, 523 & n.120 (1975).

10. STUDY § 1374.

11. 312 U.S. 246 (1941); *accord*, Native Am. Church of Navajoland, Inc. v. Arizona Corp. Comm'n, 405 U.S. 901 (1972) (Douglas, J., dissenting); Glenwal Dev. Corp. v. Schmidt, 356 F. Supp. 67, 70 (D. P.R. 1972); Starr v. Parks, 345 F. Supp. 795, 798 (D. Md. 1972); Moyer v. Nelson, 324 F. Supp. 1224, 1229 (D. Iowa 1971);

and *Ex parte Bransford.*[12] In those cases, the Court held that a determination by a single judge is sufficient when the challenge is not to the statute authorizing the officer to act, but only to his particular exercise of statutory powers.[13]

The principal modification advocated by the Study is the abolition of any equivalent of present 28 U.S.C. section 2282 (first enacted in 1937) which requires a three-judge court whenever an injunction is sought against the enforcement of a federal statute. The rationale for this modification is that in a true system of federalism the "conditions that gave rise to the 1937 legislation no longer exist—if, indeed, they still existed when it was passed."[14] While the Study did not seek repeal of federal statutes[15] which require three-judge courts in special areas, it is, in fact, in this field of special statutes that legislative reform has commenced.[16]

Proposed sections 1375 and 1376 would regulate the proceedings of three-judge courts. Subsection (a) of section 1375 would specify the authority of the single district judge—a power not specified but assumed under present law[17]—to determine that three judges are not required. A more problematic issue is whether the chief judge of the circuit, upon receipt of a request by a district judge, should make an independent determination of the necessity of empanelling a three-judge court.[18] The Study declined to take a spe-

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Bistrick v. University of S.C., 319 F. Supp. 193, 196 (D.S.C. 1970); *cf.* Board of Regents v. New Left Educ. Project, 404 U.S. 541, 543 (1972).

12. 310 U.S. 354 (1940). *See* Steffel v. Thompson, 415 U.S. 452, 457 n.7 (1973); Native Am. Church of Navajoland, Inc. v. Arizona Corp. Comm'n, 405 U.S. at 901; United States v. Christian Echoes Ministry, 404 U.S. 561, 565 (1972); Redfearn v. Delaware Republican State Comm., 502 F.2d 1123, 1131 (3d Cir. 1974) (dissenting opinion); Moyer v. Nelson, 324 F. Supp. at 1229.

13. STUDY § 1374, Commentary, at 321.

14. Three-judge courts were believed to be a way of insuring informed and thoughtful treatment of federal statutes. Today, however, as the Study points out, there are other procedural provisions of the 1937 Judiciary Act that protect federal legislation from ill-considered invalidation by federal district courts, and the three-judge courts are no longer necessary. STUDY 325.

15. *Id.* § 1374; *id.* § 1374, Note, at 53-54; *id.* § 1374, Commentary, at 324.

16. *See* text accompanying notes 70-122 *infra.*

17. Hagans v. Lavine, 415 U.S. 528, 537 (1974); Goosby v. Osser, 409 U.S. 512 (1973); *Ex parte* Poresky, 290 U.S. 30 (1933). *See also* Turner v. City of Memphis, 369 U.S. 350 (1962); Bailey v. Patterson, 369 U.S. 31, 33 (1962). In *Bailey*, the Court declared that no three-judge requirement exists "where prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." 369 U.S. at 33. Whatever the meaning of this principle may be, the Study advisedly left the matter undetermined. STUDY § 1375(a), Commentary, at 326-27. Compare, however, the interpretations of this principle in Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) and Utica Mut. Ins. Co. v. Vincent, 375 F.2d 129, 131 n.1 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967).

18. *Compare* California Teachers Ass'n v. Newport Mesa Unified School Dist.,

cific stand on that issue but believed that under its proposed statutory language the chief judge of the circuit would have a merely ministerial duty when designating the two other judges.[19] Proposed section 1376 of the Study seeks to reform the present complex rules on the appropriate means of obtaining review of a decision to empanel a three-judge court. The existing patterns of review are so obscure that commentators have suggested that the wisest course is to file appeal and mandamus proceedings for a single case simultaneously in the court of appeals and the Supreme Court.[20]

Subsection (a) clearly provides that the court of appeals shall have jurisdiction to review decisions of district courts denying requests for three-judge courts.[21] Perhaps the most important proposal is the last clause of proposed section 1374 that "a district court of three judges shall not be convened unless the defendant files a request for such a court within twenty days after the pleading challenging his action is served upon him, or prior to hearing on an application for a preliminary injunction, whichever is earlier," together with the provision in the third sentence of proposed section 1376(a) that if no such timely request is made, "a single judge shall have jurisdiction to hear and determine the case." These provisions will abolish the doctrine that the requirement of a three-judge court is a matter of subject-matter jurisdiction (therefore non-waivable) and will eliminate unnecessary litigation, *e.g.*, the strange result that the court of appeals, if it believes that it was error for the single judge to act, must remand the case for trial by three judges.[22]

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333 F. Supp. 436 (C.D. Cal. 1971); Sinatra v. New Jersey State Comm'n of Investigation, 311 F. Supp. 678 (D.N.J. 1970); Fiumara v. Texaco, Inc., 240 F. Supp. 325 (E.D. Pa. 1965) *with* Jackson v. Choate, 404 F.2d 910 (5th Cir. 1968); Hargrave v. McKinney, 302 F. Supp. 1381 (D. Fla. 1969); Smith v. Ladner, 260 F. Supp. 918 (S.D. Miss. 1966).

19. Proposed § 1375(a) provides that the single judge "shall, unless he determines that three judges are not required, immediately notify the chief judge," whereas with respect to the chief judge, proposed § 1375(a) simply states that he "shall designate two other judges." STUDY § 1375(a), Commentary, at 328-29.

20. *See* discussion on the present complex state of the law in STUDY § 1376(a), Commentary, at 332-33.

21. Under present law the proper remedy is apparently mandamus to the Supreme Court. *See Ex parte* Metropolitan Water Co., 220 U.S. 539 (1911). *But see* Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 100 n.19 (1974); Schackman v. Arnebergh, 387 U.S. 427 (1967); Buchanan v. Rhodes, 385 U.S. 3 (1966); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 716 (1962); Jacobs v. Tawes, 250 F.2d 611 (4th Cir. 1957).

22. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 153 (1963); Borden Co. v. Liddy, 309 F.2d 871 (8th Cir. 1962); C. WRIGHT, FEDERAL COURTS § 50, at 190-91 (2d ed. 1970).

Subsection (b) of proposed section 1376, first sentence, retains the present rule that appeals from decisions of three-judge district courts lie only to the Supreme Court.[23] The second sentence provides that if the Supreme Court finds that a three-judge court was not required, it may transfer the case to the court of appeals or it may itself decide the appeal. The third sentence provides that when an appeal is taken to the court of appeals but, in the opinion of the court of appeals, should have been taken directly to the Supreme Court, the court of appeals may certify[24] the case to the Supreme Court which shall determine the case.

Thus, the Study contains strong suggestions to curtail excessive federal jurisdiction in the three-judge court field. We shall first mention the legislative efforts to enact the proposals of the American Law Institute. Thereafter, reference will be made to similar proposals likewise seeking to curtail federal jurisdiction by rearranging the federal court system.

III. Legislative Attempts to Enact the Codification Proposed by the Study

To date, proponents of the ALI proposals have been unable to secure their enactment.[25] In May 1971 Senator Quentin Burdick

23. 28 U.S.C. § 1253 (1970). Despite some doubts, the Study decided to retain the institution of direct appeal to the Supreme Court from three-judge court decisions. The additional workload on the Supreme Court's obligatory jurisdiction created thereby was believed not excessive since the Supreme Court frequently makes summary dispositions of such cases on the jurisdictional statement without a plenary hearing. As the Study stated, the cases under proposed section 1374 challenging state statutes, "unlike Expediting Act cases, ordinarily turn on questions of law rather than questions of fact, and there is no need for intermediate review to settle the fact questions." STUDY § 1376(b), Commentary, at 335. For a discussion of the problems of the Antitrust Expediting Act, 15 U.S.C. §§ 28, 29 (1970), *as amended*, 15 U.S.C.A. §§ 28, 29 (Supp. I, 1975), and the abolition of the three-judge procedure by the Antitrust Procedures and Penalties Act, 15 U.S.C.A. §§ 28, 29 (Supp. I, 1975), see text accompanying notes 68-106 *infra*.

24. Of course, this proposed certification procedure is entirely different from the present certification procedure, 28 U.S.C. section 1254(3) (1970), under which a court of appeals may certify to the Supreme Court a question of law "as to which instructions are desired" and then the Supreme Court "may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." In the infrequently used certification procedure of section 1254(3), the Supreme Court possesses strictly discretionary power, while under the third sentence of section 1376(b) the jurisdiction of the Supreme Court seems "obligatory": the Supreme Court "shall have jurisdiction to hear and determine the appeal as if it had been taken directly to that Court."

25. In the Foreword to the Study, Professor Wechsler, Director of the American Law Institute, emphasized that the work of the Institute is completed with the publication of the Official Draft of desirable legislation. He stated: "If efforts are to be made to promote its enactment, others must assume the task." STUDY 13. *See*

introduced a bill incorporating the actual text of all the ALI proposals. The bill was called the "Federal Court Jurisdiction Act of 1971."[26] Hearings were held in 1971 and 1972 in the two sessions of the 92d Congress.[27] The 1971 hearings dealt with several of the areas covered in the Study: the topics of diversity jurisdiction, of multi-party litigation, and of choice of law in the federal courts. A series of prominent professors and practitioners testified at the hearings. The record, totaling 633 pages, sets forth a number of law review articles and extensive statistical studies in appendices. A very large portion of the hearings was devoted to testimony objecting to the above-described severe limitations of diversity jurisdiction proposed by the Study. In 1972 hearings were held again, this time on admiralty jurisdiction, the United States as a party, general federal question jurisdiction, and three-judge courts. No bill was adopted by the Senate in the 92d Congress.

Instead, S. 1876 was reintroduced, with substantial modifications, by Senator Burdick on May 23, 1973.[28] No hearings were held and the Senate took no action on the revised S. 1876. As of the time of this writing (July 1975), the bill has not been reintroduced in the 94th Congress, but reintroduction is generally expected.[29] The most significant revision in the three-judge field is the rewrite of section 1374.[30] The Study had required a three-judge court generally when an injunction or declaratory judgment was sought against

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also H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 974 (2d ed. 1973).

26. S. 1876, 92d Cong., 1st Sess. (1971).

27. *Hearings On S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st. Sess. (1971-72).

28. S. 1876, 93d Cong., 1st Sess. (1973). For a rather extensive description of the revisions see 119 CONG. REC. 9637-40 (daily ed. May 23, 1973) (statement of Senator Burdick).

29. Despite extensive testimony, relatively few changes were made in the general diversity provisions, except that the general requirement of $10,000 in diversity cases was raised to $15,000 (proposed section 1301(a)). The rule prohibiting the invocation of diversity jurisdiction by a citizen of the State (S. 1876, 93d Cong., 1st Sess., § 1302(a) (1973)), the rule on "local establishment" (*id.* § 1302(b)) and the provision on "commuters" (*id.* § 1302(c)) were left intact. *See id.* § 1302(c). Many modifications were proposed with respect to federal question jurisdiction. The chapter on the United States as a party was changed to some extent, particularly with respect to the issue of counterclaims against the United States. The Study's proposed chapter on multiparty-multistate diversity was eliminated, and some changes were made in the sections on admiralty and maritime jurisdiction.

It should be noted that recently a new bill, S. 537 of the 94th Congress, which deals only with, and is restricted to limiting, three-judge court jurisdiction in a manner similar to the Burdick Amendment of § 1374 of S. 1876 of the 93d Congress, has taken substantial steps toward enactment.

30. S. 1876, 93d Cong., 1st Sess. § 1374 (1973).

a state officer on the ground of the unconstitutionality of his acts. But Senator Burdick's special amendment requires a three-judge court only when "an action is filed seeking congressional reapportionment or the reapportionment of any statewide legislative body."[31] Section 1374 of S. 1876, 93d Congress, was based upon the hearings, but reads slightly differently: "[W]hen an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body"[32] a three-judge court is required. In the hearings, the Burdick substitute for the Study's section 1374 found the approval of two judges testifying before the Committee. Judge J. Skelly Wright, of the District of Columbia Circuit, approved it enthusiastically, saying:

> [I] certainly would believe that this is an area of great public concern that continues to need the protection that three-judge district courts were originally designed to give. When we deal with redistricting of Congressmen, statewide redistricting, we have issues of such public importance that from the standpoint of public acceptance it is quite appropriate that no one Federal judge set aside what the Congress has done or what the State legislature has done . . . . These cases, moreover, ordinarily present a naked legal issue. The facts are pretty much statistical, easily available; no trial-type procedure is required ordinarily, taking evidence and so on.[33]

Chief Judge Henry Friendly, U.S. Court of Appeals for the Second Circuit, approved the Burdick substitute in a more lukewarm fashion: "Despite my distaste for three-judge courts, I approve this. It is more acceptable if such cases are heard by a court whose members include adherents of more than one political party."[34] The third witness testifying before the Committee, Professor Charles A. Wright, strongly opposed the Burdick amendment:

> [I] question the desirability of retaining the three-judge court for reapportionment cases. It is certainly true that these are important cases, but they are cases for which the three-judge court is particularly ill-suited. The three-judge court works best in cases that raise a purely legal issue. It is not well-adapted for cases that require extensive evi-

31. *Hearings on S. 1876, supra* note 27, at 748.
32. S. 1876, 93d Cong., 1st Sess. § 1374 (1973).
33. *Hearings on S. 1876, supra* note 27, at 791.
34. *Id.* at 749.

> dentiary hearings, as is commonly true of reapportionment cases.[35]

The Senate Committee adopted the Burdick amendment. The above-quoted statements highlight the nature of some of the criticisms directed against the institution of the three-judge court. The testimony demonstrates the kinds of policy questions involved: (a) Should the three-judge court be retained in exceptional cases for strictly political reasons? (Chief Judge Friendly); (b) should the three-judge courts be retained in some cases when the issues are primarily legal? (Judge Wright); (c) are they particularly inappropriate when evidentiary hearings are required? (Professor Wright); (d) or are they only inappropriate when the evidentiary issues involved require oral testimony on intent (as is the case in the antitrust field), but not when the issues deal largely with historical data? (Judge Wright).

Possibly, reapportionment cases essentially present situations in which, in the words of Judge Wright, "the facts are pretty much statistical, easily available."[36] Nevertheless, the convening of a three-judge court would still present considerable difficulties for the lower court machinery. Perhaps, the procedure adopted in the Antitrust Procedures and Penalties Act, enacted December 21,

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35. *Id.* at 774.

36. The Court's adoption of the equal populations of election districts principle as the standard for reapportionment, Reynolds v. Sims, 377 U.S. 533 (1964); Westberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962), has resulted in a relatively simple test for malapportionment. Consider the use of census figures to demonstrate the imbalance created by shifts of population in the three above-mentioned decisions at, respectively, 208 F. Supp. 431 (M.D. Ala. 1962); 206 F. Supp. 276 (N.D. Ga. 1962); 179 F. Supp. 824 (M.D. Tenn. 1959). At least initially, though, the Supreme Court experienced difficulties in sifting through the factual data. Mr. Justice Clark's statistical analysis of *Baker*, 369 U.S. at 253, prompted Mr. Justice Frankfurter's reply that "One of the Court's supporting opinions, as elucidated by commentary, unwittingly affords a disheartening preview of the mathematical quagmire . . . into which this Court today catapults the lower courts of this country without so much as adumbrating the basis for a legal calculus as a means of extrication." *Id.* at 268. Mr. Justice Harlan, dissenting, objected to the statistical approach—

> [T]he fault with a purely statistical approach to the case at hand lies not with the particular mathematical formula used, but in the failure to take account of the fact that a multitude of legitimate legislative policies, along with circumstances of geography and demography, could account for the seeming electoral disparities among counties.

Id. at 345. This criticism, however, was apparently answered in *Reynolds*, 377 U.S. at 579-80. Yet as the dissent of Mr. Justice Marshall in White v. Weiser, 412 U.S. 783, 798 (1973), indicates, whether the district courts involved in reapportionment proceedings are in fact merely calculators of population figures is doubtful. *Cf.* Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966).

1974, might be preferable.[37] Whereas the Study proposed the elimination of three-judge courts in all actions seeking injunctions against enforcement of federal statutes,[38] the Burdick amendment would abolish three-judge courts generally, while retaining them in the one substantive area of reapportionments, even when the case involves a federal statute.[39]

Certain criticisms of a technical nature seem appropriate. While the Study's section 1374 proposed that actions for declaratory judgments be treated identically with suits for injunctions,[40] the Burdick amendment did not specifically mention declaratory judgments.[41] Moreover, the Study's proposed section 1376 dealing with appellate review in three-judge court cases would be eliminated, leaving the review system in its present uncertain form.[42] The suggestion of the Study to make the three-judge court a waivable requirement instead of a subject matter issue[43] would not be adopted. And under the Burdick amendment the first sentence of the Study's proposed section 1376(b) would be eliminated. According to section 1376(b), appeals from three-judge district courts granting or denying injunctions or declaratory judgments would lie to the Supreme Court (as is done under present 28 U.S.C. section 1253). Under the Proposed Federal Court Jurisdiction Act of 1971, present 28 U.S.C. section 1253 would be repealed, as clearly superfluous, by one of the bill's introductory clauses.[44] That same repeal was retained in the 1973 version of S. 1876,[45] perhaps due to an oversight. In any event, under this new version of the bill, appeals from three-judge district court decisions challenging or refusing to challenge apportionment situations would lie to the court of appeals, not to the Supreme Court. Such a solution would seem inappropriate and, in the First Circuit, which is composed of only three judges,[46] it would also seem impracticable. Since under proposed section 1374(b)(1) of the Federal Court Jurisdiction Act of 1973[47] the chief judge of the circuit shall designate at least one circuit judge for the three-judge court, it may be burdensome in that circuit to find three judges to sit on the panel hearing an appeal

37. 15 U.S.C.A. §§ 28, 29 (Supp. I, 1975).
38. *See* 28 U.S.C. § 2282 (1970).
39. S. 1876, 93d Cong., 1st Sess. (1973).
40. STUDY § 1374, Commentary. *See also* note 9 *supra* and accompanying text.
41. *Hearings on S. 1876*, *supra* note 27, at 750.
42. *See* text accompanying notes 20-24 *supra*.
43. *See* text accompanying note 22 *supra*.
44. S. 1876, 92d Cong., 1st Sess. § 2(c)(1) (1971).
45. S. 1876, 93d Cong., 1st Sess. § 2(c)(1) (1973).
46. 28 U.S.C. § 44 (1970).
47. S. 1876, 93d Cong., 1st Sess. § 1374(b)(1) (1973).

from the three-judge district court decision.[48] Accordingly, if the three-judge court is retained, the principle of direct appeals to the Supreme Court should be reinstituted for the apportionment cases.

IV. JUDICIAL STATEMENTS CONCERNING THREE-JUDGE COURTS

The Supreme Court's attitude toward three-judge courts is reflected by three statements made at different times. Because of the burdens imposed upon the entire federal system, Mr. Justice Frankfurter in 1941 in *Phillips v. United States* described the statutory requirement of the three-judge court not "as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."[49] In *United States v. Singer Manufacturing Co.*,[50] decided in 1963, Mr. Justice Clark stated that direct appeals to the Supreme Court "not only place a great burden on the Court but also deprive us of the valuable assistance of the Court of Appeals."[51] And in 1974 the Supreme Court, per Mr. Justice White, when sanctioning a restrictive interpretation of the three-judge court requirement,[52] quoted Mr. Justice Harlan's reference, in *Swift & Co. v. Wickham*, to " 'this Court's concern for efficient operation of the lower courts,' and 'the constrictive view of the three-judge court jurisdiction which this Court has traditionally taken'."[53]

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48. *See* 28 U.S.C. § 46 (1970).

49. 312 U.S. 246, 251 (1941). *See also* Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98 n.16 (1974); Swift & Co. v. Wickham, 382 U.S. 111 (1965); Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92-93 (1960); *Ex parte* Collins, 277 U.S. 565, 567 (1928).

50. 374 U.S. 174 (1963).

51. *Id.* at 175 n.1 (1963). *Contra*, Tidewater Oil Co. v. United States, 409 U.S. 151, 174 (1972) (Douglas, J., dissenting). *See also* Ford Motor Co. v. United States, 405 U.S. 562, 595 n.5 (1972) (Burger, C.J., separate opinion); United States v. Borden Co., 370 U.S. 460, 477 n.5 (1962) (Harlan, J., dissenting); Brown Shoe Co. v. United States, 370 U.S. 294, 355 (1962) (Clark, J., concurring); *id.* at 364-65 (Harlan, J., separate opinion).

52. Hagans v. Lavine, 415 U.S. 528, 544 (1974). *See* Note, *Federal Jurisdiction: Supreme Court Strains to Provide a Federal Forum for Challenges to State Administration of Welfare Programs*, 59 MINN. L. REV. 761, 773 (1975).

53. *See* Swift & Co. v. Wickham, 382 U.S. 111 (1965), which overruled the holding of Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962), that a conflict between a state statute and a federal statute pursuant to the supremacy clause is a sufficient charge of "repugnance to the Constitution of the United States" within 28 U.S.C. § 2282 (1970), to require a three-judge court. In Hagans v. Lavine, 415 U.S. 528, 537 (1974), a challenge on clear constitutional grounds had been joined with a mere supremacy clause challenge, but, nevertheless, a decision by a single judge on the supremacy clause challenge was held adequate as a preliminary matter. *But cf.*, *e.g.*, the earlier case of Louisville & N.R.R. v. Garrett, 231 U.S. 298 (1913).

Many narrow interpretations of the three-judge court requirement demonstrate these restrictive views of the Court. Thus, the "statute" to be enjoined under section 2281[54] does not include ordinances or statutes having only local application.[55] The statutory provision was held not to govern suits against local officers,[56] or against state officers performing acts of purely local concern.[57] In a court of appeals opinion, the provision was described as a "deceptively simple statute."[58] In an earlier Supreme Court opinion it was held that the three-judge requirement does not apply where it is merely claimed that the officials are administering a constitutional statute in an unconstitutional manner.[59] Recently, the Supreme Court construed Section 1253 of Title 28[60] very narrowly by holding that an injunction is not "denied" within the meaning of that statute (and therefore no direct appeal lies to the Supreme Court) when the denial is based on the plaintiff's lack of standing.[61]

Of course, a heavy burden is imposed on the federal judiciary by the three-judge requirement. In nonmetropolitan areas the requirement to summon a second district judge and a judge of the court of appeals to sit as a three-judge district court frequently creates practical difficulties. Also, direct appeal to the Supreme Court is contrary to the general idea of giving that Court substantial control over its own docket.[62] Accordingly, a bill was intro-

54. 28 U.S.C. § 2281 (1970).

55. Board of Regents v. New Left Educ. Project, 404 U.S. 541 (1972); Perez v. Ledesma, 401 U.S. 82 (1971); Moody v. Flowers, 387 U.S. 97 (1967); *Ex parte* Public Nat'l Bank, 278 U.S. 101 (1928); *Ex parte* Collins, 277 U.S. 565 (1928); *cf.* Alabama State Teachers Ass'n v. Alabama Public School and College Authority, 393 U.S. 400, 401 (1969) (Harlan, J., dissenting).

56. Wilentz v. Sovereign Camp, Woodmen, 306 U.S. 573 (1939).

57. Rorick v. Board of Comm'rs, 307 U.S. 208 (1939).

58. Sardino v. Federal Reserve Bank, 361 F.2d 106, 114 (2d Cir. 1966).

59. Phillips v. United States, 312 U.S. 246 (1941).

60. 28 U.S.C. § 1253 (1970).

61. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974). *But see* Medguski v. Margolis, 389 F. Supp. 745 (D.D.C. 1975). *See also* MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Fitzgerald v. diGrazia, 419 U.S. 1065 (1974); MTM, Inc. v. Baxley, *supra*, at 808 (Douglas, J., dissenting) (statements as to the continuing value of three-judge courts).

62. In the eight years from fiscal 1963 through 1970 the number of three-judge courts convened has risen over 125 percent, while from 1969 to 1970 alone the increase amounted to 35 percent. Ammerman, *Three-Judge Courts: See How They Run!*, 52 F.R.D. 293, 305 (1971). *See Hearings on S. 1876*, *supra* note 27, at 749 (Statement by Chief Judge Friendly); C. WRIGHT, FEDERAL COURTS § 50 (1970, Supp. 1972). *See also* STUDY 317. See the statements by Chief Justice Burger calling for reduction or elimination of three-judge courts, 61 A.B.A.J. 303, 304 (1975); *Report of the Study Group on the Case Load of the Supreme Court*, 57 F.R.D. 573, 598 (1972) ("*Freund Report*"); Boskey & Gressman, *Recent Reforms in the Federal Judicial Structure*, 67 F.R.D. 135 at 135, 142 (1975). However, the tremendous increase in numbers of three-judge court cases appears to have leveled

duced in 1971[63] amending present 28 U.S.C. sections 2281 and 2282 that would eliminate the three-judge court requirement. Detailed provisions would require that notice be given in injunction cases to the Attorney General and Governor of the State, or to the Attorney General of the United States. According to proposed section 1259[64] direct appeals to the Supreme Court could be taken by the State or the U.S. Attorney General, respectively, from district court decisions granting injunctions against enforcement of statutes repugnant to the Constitution; but the Supreme Court, instead of deciding the direct appeal, could remand the case to the court of appeals.[65] Apparently, no equivalent to that bill[66] has since been introduced. Rather, the latest attempts to deal with three-judge courts—amended S.1876 of the 92d and 93d Congresses—have basically followed the suggestions advanced by the Study.[67]

Whatever the future of general revisions of the three-judge court system may be, legislation was enacted recently abolishing the system in the expediting mechanism of the Antitrust Procedures and Penalties Act[68] and in the area of the ICC's orders.[69]

V. Recent Legislation Limiting Three-Judge Court Jurisdiction

Of the two acts passed in the closing days of the 93d Congress limiting three-judge court jurisdiction, the first, the Antitrust Procedures and Penalties Act,[70] seems the more significant.

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off. The Court heard 318 such cases in 1971 ("*Freund Report*," *supra*, at 598), 310 and 320 appeals in 1972 and 1973 respectively, but only 249 arguments from three-judge courts in 1974. 1974 Administrative Office of the United States Courts Annual Report IX-44; Boskey & Gressman, *supra*, at 141-42 n.11. Whether this decline is natural or induced by a reluctant Court, *see, e.g.*, note 61 *supra*, is an open question.

63. H.R. 3805, 92d Cong., 1st Sess. (1971), *reprinted in* Ammerman, *supra* note 62, at 313.

64. *Id.* § 1259.

65. The latter proposal is objected to by Professor Wright. C. Wright, Federal Courts § 50 (Supp. 1972). He argues that the normal appeal to the court of appeals is preferable; the power of the Supreme Court to grant certiorari of a case before judgment of the court of appeals would take care of situations where prompt action of the Supreme Court is highly desirable.

66. H.R. 3805, 92d Cong., 1st Sess. (1971).

67. See discussion of the Burdick amendment, text accompanying notes 28-48 *supra*.

68. Pub. L. No. 93-528, 88 Stat. 1706 (codified in scattered sections of 15 U.S.C.A.).

69. Act of Jan. 2, 1975, Pub. L. No. 93-584, 88 Stat. 1917 (codified in scattered sections of 28 U.S.C.A.).

70. 15 U.S.C.A. § 28 *et seq.* (Supp. I, 1975), *amending* 15 U.S.C. § 28 (1970). A substantial portion of its legislative history is reprinted at 1974 U.S. Code Cong.

Principally, the Act eliminated the three-judge court jurisdiction of the Expediting Act,[71] and modified the former system of direct appeals to the U.S. Supreme Court.[72] The new statute provides that upon the filing by the Attorney General of a certificate of "general public importance" the case shall be expedited. Formerly, the only appeal from a final decision of a district court was to the Supreme Court, whether or not the district court had been composed of three judges.[73] Now, 15 U.S.C.A. section 29 lays down detailed rules for appellate review of final judgments of district courts in antitrust cases brought by the United States seeking equitable relief. According to subsection (a), a normal appeal may be had to the U.S. court of appeals under 28 U.S.C. sections 1291[74] and 2107,[75] and appeals from interlocutory orders may be had under 28 U.S.C. sections 1292(a)(1)[76] and 2107.

But an interesting alternative was provided in 15 U.S.C.A. section 29(b). A direct appeal to the Supreme Court shall lie under the following conditions: (a) That upon application of a party filed within 15 days of the notice of appeal the district judge has within 30 days of that notice entered an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance; and (b) that the appeal has been docketed in the time prescribed by the Supreme Court Rules. Then, the Supreme Court may dispose of the appeal in the normal manner prescribed for appeals to the Supreme Court or, in its discretion, may remand the case to the court of appeals which shall handle it as if it had been appealed to the court of appeals like a normal appeal under the new subsection (a).

There is also a new provision permitting immediate appellate review of district court rulings on motions for pretrial injunctions under 28 U.S.C. section 1292(a)(1). The former law had permitted no such reviews but had allowed review of injunctions only

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& AD. NEWS 6535-46. For a critical view of the new statute, based on doubtful premises, see Rosett, *The Supreme Court versus the District Court in Antitrust Cases*, 26 MERCER L. REV. 795, 797, 807 (1975).

71. *See* Expediting Act § 1, ch. 544, § 1, 32 Stat. 823, *as amended*, 15 U.S.C.A. § 28 (Supp. I, 1975), stating that in a civil antitrust action brought by the United States a three-judge court was to be convened if the Attorney General certified that the case was "of general public importance."

72. Expediting Act § 2, ch. 544, § 2, 32 Stat. 823, *as amended*, 15 U.S.C.A. § 29 (Supp. I, 1975).

73. *See* C. WRIGHT, *supra* note 22, § 105, at 471.

74. 28 U.S.C. § 1291 (1970).

75. *Id.* § 2107.

76. *Id.* § 1292(a)(1).

after completion of the trial.[77] The amendment, it was stated, "would possibly conserve substantial enforcement resources and, in view of the legal issues in merger cases, obviate the need for some trials."[78] As the Committee Report stated, the "possible direct Supreme Court post-trial review of litigated government civil antitrust cases reflects legislative recognition of the Attorney General's responsibilities to coordinate national antitrust enforcement policies," and "the legislative conferral of discretion in post-trial appeals on the Attorney General is expected to increase vigorous enforcement of the antitrust laws by the Department of Justice."[79]

In discussing the ramifications of the new Antitrust Procedures and Penalties Act, Messrs. Boskey and Gressman raise two important technical points. First, regarding direct appeal to the Supreme Court, "it may happen that the appeal is not qualified under the Expediting Act to be taken to the Supreme Court until the time for docketing the appeal (which includes preparing and filing a jurisdictional statement) is about to expire."[80] They, therefore, urge counsel to seek an extension of the time for docketing from a Supreme Court Justice.[81] This may be advisable because although the time limit for docketing an appeal is 90 days from the entry of the judgment appealed from,[82] that time may have been consumed because (a) the time for filing the notice of appeal is 60 days;[83] (b) under 15 U.S.C.A. section 29(b), as amended, the party who has filed the notice of appeal has 15 days for filing an application for the order suggesting a direct appeal; and (c) some time may, of course, be consumed by the district court in deciding whether or not to grant such an order. Messrs. Boskey and Gressman suggest that, if the docketing rules are not changed, it should still be assumed that "the entry of the district court's expedited appeal order would have no effect upon the computation of that 90-day docketing period."[84]

Whatever the merits of such an assumption, clarification of the

77. *See* United States v. FMC Corp., 84 S.Ct. 4 (1963) (Goldberg, J., in chambers) (application for preliminary injunction denied). *See also* United States v. Cities Serv. Co., 410 F.2d 662 (1st Cir. 1969).

78. H.R. REP. No. 1463, 93d Cong., 2d Sess. 10 (1974). This view might be compared with the earlier opposite view that the abolition of interlocutory appeals would serve to eliminate the delays inherent in such appeals. United States v. California Co-op Canneries, 279 U.S. 553 (1929).

79. H.R. REP. No. 1463, *supra* note 78, at 11.

80. Boskey & Gressman, *supra* note 62, at 151.

81. *Id.* at 151 n.30.

82. SUP. CT. R. 13(1).

83. *See* 28 U.S.C. § 2101(b) (1970).

84. Boskey & Gressman, *supra* note 62, at 151 n.30.

time limitation of docketing clearly seems desirable. Such a change in the Supreme Court Rules recalls the manner in which the problem of the special appeal procedure of 28 U.S.C. section 1292 (b) was handled. Under 28 U.S.C. section 1292(b) the district court and, thereafter, the court of appeals are authorized to permit certain interlocutory appeals, which may consume the time limitation for notice of appeal. But despite the silence of the 1958 statute which added 28 U.S.C. section 1292(b) to the Code,[85] and despite the apparently definite statutory time limitation of notices of appeals (28 U.S.C. section 2107), the problem was handled by adopting rule 5 of the Federal Rules of Appellate Procedure which stated that when dealing with appeals under 28 U.S.C. section 1292 (b) "A notice of appeal need not be filed."[86] Handling the above-stated docketing problem under the Expediting Act would seem to be a less troublesome issue.

There cannot be any doubt as to the soundness of the second suggestion advanced by Messrs. Boskey and Gressman that counsel should, in his jurisdictional statement, show why immediate consideration of the appeal by the Supreme Court is important.[87] Attention to this suggestion may serve to assist the Supreme Court in developing case law concerning the special procedure of immediate appeals to the Supreme Court.

Messrs. Boskey and Gressman look upon the special procedure of immediate appeals to the Supreme Court, with its discretionary character, as a departure from the obligatory-type jurisdiction of appeals which now exists "at least in theory."[88] On the ground that the word "discretion" appears in new 15 U.S.C.A. section 29(b),[89] they reach the conclusion that under this new class of appeals the Supreme Court "is authorized to entertain or not to entertain, on purely discretionary grounds—just as it grants or denies petitions for certiorari on discretionary grounds."[90]

This conclusion may be doubtful in view of the statement in the House Report that new 15 U.S.C.A. section 29(b) does not mean that the Supreme Court is intended to have a free and absolute

85. Act of Sept. 2, 1958, 28 U.S.C. § 1292(b) (1970).

86. FED. R. APP. P. 5.

87. Boskey & Gressman, *supra* note 62, at 154.

88. *Id.* at 155. That statement, undoubtedly, has reference to the fact that by its own interpretation the Supreme Court has read into the appeal provision of 28 U.S.C. § 1257(2) (1970)—although it is couched in "obligatory" language—the requirement that, in order to give rise to an appeal, the federal question involved must be "substantial." Zucht v. King, 260 U.S. 174, 176, 177 (1922); SUP. CT. R. 15(1)(e).

89. 15 U.S.C.A. § 29(b) (Supp. I, 1975).

90. Boskey & Gressman, *supra* note 62, at 155.

discretion to hear or not hear a case on direct review.[91] It should be noted that with respect to the similar power of a party to bypass the court of appeals with the certiorari proceedings of 28 U.S.C. section 1254,[92] the Committee made the statement that it did "not intend to duplicate that law through its amendment."[93] In any event, the new procedure of 15 U.S.C.A. section 29(b) introduces a significant new device. A similar device existed in the suggested section 1259 of Title 28 proposed by H.R. 3805, which had sought to do away with three-judge courts generally.[94] Such a device may be the means whereby Congress, though eliminating three-judge courts, will still give effect to the special significance of particular situations. It is a question of legislative policy whether such a solution is desirable. Professor Wright objected to proposed section 1259 on the grounds that normal appeals to the court of appeals are preferable, and that the Supreme Court's power to grant certiorari before a court of appeals decision covers those situations where an immediate review by the Supreme Court is desirable.[95] But this argument fails to recognize that, at least psychologically, the new device of 15 U.S.C.A. section 29(b) is not the same solution as that of certiorari preceding a court of appeals decision. Under the new procedure of section 29(b), the Supreme Court will receive for a particular determination substantially all cases found by a district court to be worthy of immediate Supreme Court review, and in section 29(b) there is, in the record, a prior district court determination that immediate consideration by the Supreme Court is appropriate. Unlike the certiorari proceedings, there will be statements of two tribunals favoring immediate Supreme Court review.[96]

A similar emphasis on judicial action is found in the lengthy section 2 of the Antitrust Procedures and Penalties Act[97] which treats in detail the subject of consent decrees, the all-important and most frequently used device of antitrust litigation. Formerly, the proviso of 15 U.S.C. section 16(a)[98] specified that consent decrees in government antitrust actions that were entered before any testimony was taken would not be prima facie evidence for any other party in a

91. H.R. REP. No. 1463, *supra* note 78, at 14.

92. 28 U.S.C. § 1254 (1970).

93. H.R. REP. No. 1463, *supra* note 78, at 13-14.

94. *See* note 66 *supra* and accompanying text.

95. *See* note 65 *supra.*

96. *See also* the procedure under 28 U.S.C. § 1292(b) (1970), concerning appeals from interlocutory orders. In our concluding chapter we shall examine the continued existence of three-judge courts, and we shall suggest to what extent solutions like that of the Antitrust Procedures and Penalties Act might be desirable.

97. 15 U.S.C.A. § 16 (Supp. I, 1975), *amending* 15 U.S.C.A. § 16 (1973).

98. 15 U.S.C.A. § 16(a) (1973), *as amended*, 15 U.S.C.A. § 16(a) (Supp. I, 1975).

suit under the antitrust laws against the same defendant. That provision is retained, but now it is required that together with the proposal for a consent judgment, there be filed in the court and published in the Federal Register a competitive impact statement at least 60 days prior to the effective date of the judgment.[99] Simultaneously, a statement must be filed "for 7 days over a period of 2 weeks in newspapers of general circulation," summarizing the proposed consent judgment, the above-described competitive impact statement, and listing the documents the United States will make available for public comment. Written comments shall then be received by the United States. After the 60-day period has lapsed, the United States shall then file in the district court, and publish in the Federal Register, its response to such comments.[100]

Subsections (e) and (f) of new 15 U.S.C. section 16[101] deal with the judicial practices and procedures upon submission of a proposal for a consent decree. As the House Committee explained, "One of the abuses sought to be remedied by the bill has been called 'judicial rubber stamping' by district courts of proposals submitted by the Justice Department."[102] Now, before entering a consent decree, the district judge shall determine whether such entry is in the public interest. In that connection, the court may consider the competitive impact of the decree, as well as its impact upon the public generally and upon individuals alleging specific injury. In making its determination, the court may take testimony of government officials or experts, may appoint a special master, may authorize participation by interested persons (including intervention under the Federal Rules[103] and examination of witnesses or documentary

99. Such a statement would explain the nature of the proceeding, the practices giving rise to the alleged violation, the proposal for a consent judgment, the remedies available to private plaintiffs, the procedures for modifying the proposal, and alternatives considered by the United States. 15 U.S.C.A. § 16(b) (Supp. I, 1975).

100. 15 U.S.C.A. §§ 16(b), (c), (d) (Supp. I, 1975). Presently, as a matter of internal policy only, the Department of Justice has slightly similar but considerably less specific procedures containing shorter time limitations. The House Report quoted a statement of the earlier (1959) Report of the House Antitrust Subcommittee, as follows: "The consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures." The new bill, in the words of the House Committee, "is designed to substitute 'sunlight' for 'twilight' and to regularize and make uniform judicial and public procedures." H.R. REP. No. 1463, *supra* note 78, at 6.

101. 15 U.S.C.A. §§ 16(e), (f) (Supp. I, 1975).

102. *See* H.R. REP. No. 1463, *supra* note 78, at 8.

103. For the present law concerning intervention of private parties after the entry of consent decrees, see Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941) (prior to 1966 amendment to FED. R. CIV. P. 24); Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 136 (1967) (subsequent to 1966 amendment to FED. R. CIV. P. 24).

materials), or may review any comments or objections.[104] Finally, new subsection (g) of 15 U.S.C. section 16[105] provides that within 10 days of the filing of the proposed consent decree the defendants shall describe to the district court all "lobbying" communications made by them or on their behalf to a United States employee, but "lawyering" contacts by counsel of record for defendants meeting alone with members of the Department of Justice are exempt.[106]

The second recent statute eliminating three-judge court jurisdiction deals with review proceedings of rules, regulations, and final orders of the Interstate Commerce Commission.[107] The statute is shorter than the Antitrust statute and is unlikely to create many problems. Essentially, amended 28 U.S.C.A. section 2342 seeks to end the peculiar status of the ICC. Many years ago, judicial review of orders of the Federal Maritime Board or the Maritime Commission,[108] of the Federal Communications Commission,[109] of certain orders of the Secretary of Agriculture,[110] and of certain orders of the ICC, required three-judge district courts. But whereas the so-called Hobbs Act[111] abolished the three-judge requirement for most cases, and in lieu thereof substituted review by the court of appeals, it did not do so for the ICC. Judicial review of ICC orders

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104. The new statute emphasizes the judicial function in the area of consent decrees. Its purposes are to foreclose, to the extent possible, future disputes concerning the language of the decree or the intentions of the parties (*see* United States v. Atlantic Ref. Co., 360 U.S. 19 (1959)) and to facilitate future modifications of a consent decree (*see* United States v. Armour & Co., 402 U.S. 673 (1971)).

The greater recognition of the judicial function with regard to consent decrees may be contrasted with the opposite development in the area of the Federal Tort Claims Act where until 1966 the section dealing with compromises authorized the Attorney General to settle "with the approval of the court" but the requirement of court approval was eliminated, since, as a practical matter, the decision to settle was reached by the Justice Department. Act of July 18, 1966, PUB. L. NO. 89-506, 88 Stat. 307 (codified in scattered sections of 28, 31 U.S.C. (1970)). *See* Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212, 1220 (1967).

105. 15 U.S.C.A. § 16(g) (Supp. I, 1975).

106. See H.R. REP. NO. 1463, *supra* note 78, at 9, for a description of how this provision seeks to codify legal ethics.

107. Act of Jan. 2, 1975, PUB. L. NO. 93-584, 88 Stat. 1917 (codified in scattered sections of 28 U.S.C.A.); *cf.* text accompanying notes 27-48 *supra*; S. 1876, 93d Cong., 1st Sess. § 1325(a) (1973); S. 1876, 92d Cong., 1st Sess. § 1325(a) (1971). Section 1325(a) seems to have been superseded by the enactment of 28 U.S.C.A. § 1336.

108. Act of Sept. 7, 1916, ch. 451, § 31, 39 Stat. 738.

109. Act of June 19, 1934, ch. 652, Title IV, § 402(a), 48 Stat. 1092.

110. Act of June 10, 1930, ch. 436 § 11, 46 Stat. 535; Act of Oct. 22, 1913, ch. 32, 38 Stat. 220.

111. Act of Dec. 29, 1950, ch. 1189 §§ 1, 2, 64 Stat. 1129, *as amended*, 28 U.S.C.A. §§ 2341, 2342 (Supp. I, 1975).

retained the three-judge district court requirement.[112] That special situation was generally deplored,[113] and 28 U.S.C.A. section 2342 remedies it.

The new statute brings to the court of appeals proceedings to enjoin in whole or in part a rule, regulation, or order of the Interstate Commerce Commission.[114] No statutory possibility of direct appeal to the Supreme Court from those court of appeals decisions was created,[115] but the general discretionary certiorari review rule of 28 U.S.C. section 1254(1) applies. Obviously, ICC proceedings were not considered to present such new, important, and basicially non-factual legal issues as to suggest an early Supreme Court determination.

An interesting side-issue occupied a considerable portion of the legislative history of Pub. L. No. 93-584. That issue, so important both for the government and the private lawyer, related to the control of the litigation on the government's side, *viz.* whether the governmental agency's counsel themselves might directly represent the agency in court, independently of the Department of Justice. The issue was fully discussed in the statement of Mr. George M. Stafford, Chairman of the Interstate Commerce Commission, to the House Judiciary Committee on December 10, 1974.[116] Mr. Stafford expressed the concern of the Commission "that the first sentence of section 2348 is susceptible of the construction that the Commission would be precluded from taking a position in a case independent of and separate from that of the Department or, under section 2350, filing a petition for a writ of certiorari on its own."[117]

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112. Act of June 25, 1948, ch. 646, § 2325, 62 Stat. 970, *as amended*, 28 U.S.C.A. § 2342 (Supp. I, 1975).

113. *See, e.g., Report of the Study Group on the Caseload of the Supreme Court*, *supra* note 62, at 597.

114. *See* 28 U.S.C. § 2321 (1970), *as amended*, 28 U.S.C.A. § 2321 (Supp. I, 1975). The great number of three-judge court proceedings involving the ICC was believed to put too great a strain on the judiciary. S. REP. No. 500, 93d Cong., 1st Sess. 2-3 (1973). But jurisdiction was given to the district courts under 28 U.S.C.A. § 1336(a) (Supp. I, 1975) of any civil action to enforce any order of the Interstate Commerce Commission, and to enjoin any order of the Commission for the payment of money or the collection of fines, penalties, or forfeitures.

Thus, in the case of the ICC, district court jurisdiction is retained for a small group of less significant cases, *i.e.*, cases which usually are not among the ICC cases of broader significance. From these district court decisions normal appeals lie to the court of appeals. 28 U.S.C. § 1291 (1970).

115. Unlike the Antitrust statute, 15 U.S.C. § 28 (1970), *as amended*, 15 U.S.C.A. § 28 (Supp. I, 1975). *See* notes 68-106 *supra*.

116. *See* H.R. REP. No. 1569, 93d Cong., 2d Sess. 14-20 (1974), commenting favorably on 28 U.S.C. § 2323 (1970), *as amended*, 28 U.S.C.A. § 2323 (Supp. I, 1975).

117. H.R. REP. No. 1569, *supra* note 116, at 15. Sections 2348 and 2350 are part of the Hobbs Act, ch. 1189, §§ 8, 10, 64 Stat. 1129 (1950), *as amended*, 28

The House Committee Report dismissed the Commission's fears as ill-founded. In lecturing to the Commission on the unsoundness of its position, the Committee took the trouble of quoting the second and third sentences of 28 U.S.C. section 2348, which specifically state that the agency may appear as a party of its own motion and as of right, and be represented by counsel, and the third sentence of 28 U.S.C. section 2350, which permits the agency, as well as the United States, to file a petition for certiorari.[118]

However, that was not the objection the ICC had. Rather, the Commission objected that the existing 28 U.S.C. section 2323 states that, "[t]he Attorney General shall *represent* the Government,"[119] while the Hobbs Act, as amended, states that "[t]he Attorney General is responsible for and has *control* of the interests of the Government."[120]

U.S.C. §§ 2348, 2350 (1970). The first sentence of 28 U.S.C. § 2348 (1970) reads: "The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter." 28 U.S.C. § 2350 (1970) deals with the review in the Supreme Court on certiorari. *See also* S. REP. No. 500, *supra* note 114; text accompanying notes 22-24 *supra*.

118. H.R. REP. No. 1569, *supra* note 116, at 8.

Arguments between the Department of Justice and the agencies as to who is to conduct the litigation affecting an agency—the Justice Department lawyers or the agency's lawyers—are, of course, not new. H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1315-20 (2d ed. 1973); D. SCHWARTZ & S. JACOBY, GOVERNMENT LITIGATION 26-27 (1963); D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT § 1.123 (1970); *cf.* FTC v. Dean Foods Co., 384 U.S. 597 (1966); FTC v. Claire Furnace Co., 274 U.S. 116 (1926). One of the classical highlights in this field is an Executive Order of June 10, 1933, transferring litigation functions to the Justice Department. Exec. Order No. 6166, 5 U.S.C. §§ 124-32 (1933), *as amended*, 5 U.S.C. § 901 (1970), *quoted in* Sullivan v. United States, 348 U.S. 170, 172 n.2 (1954).

Recent highlights include statutes authorizing representation of agencies by their own lawyers. *E.g.*, 15 U.S.C. §§ 77t(b), 78u(e) (1970) (Securities and Exchange Commission); 16 U.S.C. § 825m(a) (1970) (Federal Power Commission); 29 U.S.C. §§ 160(e), (j), (*l*) (1970) (National Labor Relations Board). In addition, a broad statutory provision reserves, "except as otherwise authorized by law," the conduct of litigation to the Justice Department. 28 U.S.C. § 516 (1970). Finally, of course, administrative practices have developed over the years. D. SCHWARTZ & S. JACOBY, GOVERNMENT LITIGATION 27 (1963).

119. 28 U.S.C. § 2323 (1970), *as amended*, 28 U.S.C.A. § 2323 (Supp. I, 1975) (italics supplied).

120. Act of Dec. 29, 1950, ch. 1189, § 8, 64 Stat. 1129, *as amended*, 28 U.S.C. § 2348 (1970) (italics supplied). The Hobbs Act, as amended, specifically safeguards the separate right of the agency to appear and be represented by its own counsel, and by what is now 28 U.S.C. § 2350(a) (1970), it grants the agency the rare privilege of filing its own petition for certiorari. *Cf.* United States v. ICC, 396 U.S. 491 (1970) (the Department of Justice taking a view opposite to the Commission). Without clear statutory authority, the ICC apparently has since 1913 represented itself before the Supreme Court. Statement of the ICC to the House Committee, H.R. REP. No. 1569, *supra* note 116, at 17 n.16. For a broad statement of former

In lecturing to the ICC, the House Committee concluded that any activity of the Attorney General abridging the statutory rights of the ICC "would be subject to challenge in court."[121] The Committee did not specify what the remedy would be, but apparently there could be no defense of sovereign immunity raised in an action to force the Attorney General to afford the ICC its statutory right of independent representation.[122]

VI. SUMMARY OF THE PRESENT STATUS AND REMAINING INSTANCES OF THREE-JUDGE COURT REQUIREMENTS

The efforts to limit three-judge court jurisdiction have been described.[123] Several questions occur. Will the reform of federal jurisdiction concentrate on so-called organizational matters, as distinguished from substantive limitations?[124] If so, as seems likely, should the remaining special statutes which still require three-judge court determinations be amended first?[125] The Regional Rail Reor-

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Solicitor General Griswold emphasizing the desirability of the Solicitor General's rather than the agencies' being ultimately responsible for Supreme Court aspects of government litigation, see Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 344 (1975). See also his testimony at *Hearings on H.R. 5050 and H.R. 340 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce* (Securities Exchange Act Amendments of 1973), 93d Cong., 1st Sess., ser. 93-50, pt. 1, at 272-96 (1973), where he took the occasion of the discussion of section 101(d)(1) of H.R. 5050—which would have authorized the SEC to "conduct in its own name and through its own attorneys litigation . . . in the . . . Supreme Court" —to expand upon the importance of the Solicitor General's office. *Id.* at 285. That provision of the bill did not become law. For Griswold's specific reference to the ICC's handling its own Supreme Court litigation, see *id.* at 293; for the report of the SEC on the bill, see *id.* at 117-24. *See also* 28 U.S.C. § 518(a) (1970); S. REP. No. 500, *supra* note 114, at 6.

121. H.R. REP. No. 1569, *supra* note 116, at 9.

122. As an incident to court litigation, such a court order would seem to be valid even in the absence of a specific waiver of sovereign immunity. An analogy could be made to the validity, even without specific statutory consent, of a court order directing that a matter is considered admitted if the Government's answer to a request for an admission is found to be non-responsive. FED. R. CIV. P. 36(a).

123. *See* notes 13-48, 70-106 *supra* and accompanying text.

124. *See* text accompanying note 7 *supra.*

125. Federal Election Campaign Fund Act of 1971, 26 U.S.C. § 9010(c) (Supp. II, 1972); Voting Rights Act of 1965, 42 U.S.C. §§ 1973b(a), 1973(c), 1973h(c) (1970), § 1971(g) (Supp. II, 1972), *as amended*, Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act of 1970, 42 U.S.C. §§ 1973aa-2, 1973bb-2 (1970), *as amended*, Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (1970); Regional Rail Reorganization Act, 45 U.S.C.A. § 743(d) (Supp. 1975) (a statute temporary in character). The earlier three-judge court requirement in TVA condemnation cases was repealed

ganization Act of 1973 can be disregarded in this connection since the entire procedure of that Act is a one-time affair, limited to the exigencies of a specific situation.[126]

But should we otherwise follow the example by which three-judge courts in the Antitrust Expediting Act were abolished?[127] In other words, should we abandon the requirements of three-judge court determinations but provide some form of immediate "obligatory" appeal to the Supreme Court? Should such a possibility be created where the existence of large, potentially determinative legal issues, as distinguished from cumbersome factual examinations, may suggest early Supreme Court clarification? Should a distinction, such as the one developed by Judge Wright in support of Senator Burdick's amendment preserving three-judge courts for reapportionment cases,[128] be transplanted as a justification for providing a qualified immediate appeal to the Supreme Court? And if it is so transplanted, which of the remaining statutes would seem to warrant the immediate Supreme Court appeal?

Probably the Voting Rights Act of 1965,[129] and the Voting Rights Act of 1970,[130] (as given continued life in 1975),[131] are provisions

in 1968. Act of Sept. 8, 1968, Pub. L. No. 90-536, § 1, 82 Stat. 885, *repealing* 16 U.S.C. § 831x (1964).

126. The "Special Court" established by the Regional Rail Reorganization Act of 1973 is not a typical three-judge district court convened by the chief judge of the court of appeals, but is a three-judge court established by the Judicial Panel on Multidistrict Litigation acting pursuant to 28 U.S.C. § 1407 (1970); *see* Regional Rail Reorganization Act § 209(b), 45 U.S.C.A. § 719(b) (Supp. 1975). The Special Court, convened in the United States District Court for the Eastern District of Pennsylvania, with direct appeal to the Supreme Court, consists of two circuit judges and one district judge. *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, at 110-11, n.7 (1974). It was established as a special tribunal to deal with midwest rail carriers engaged in reorganization proceedings under section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1970). A decision of the three-judge Special Court held the Rail Reorganization Act unconstitutional, but the decision was reversed by the Supreme Court on the ground that proceedings under the Tucker Act, 28 U.S.C. § 1491 (1970), are available to provide just compensation for any taking. *Blanchette v. Connecticut Gen. Ins. Corp., supra.* The procedure under the Rail Reorganization Act is so unusual and so much a temporary affair that our general views on the undesirability of the three-judge court system should not be applied here, especially since the "Special Court" of the Rail Reorganization Act apparently was not established by Congress for political reasons, but rather was enacted as a "one-time" affair, and as a multidistrict matter.

127. 15 U.S.C.A. § 29(b) (Supp. I, 1975), *amending* 15 U.S.C. § 29 (1970).

128. *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess., at 791 (1972).

129. 42 U.S.C. §§ 1973b(a), 1973(c), 1973h(c) (1970), § 1971(g) (Supp. II, 1972), *as amended*, Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400.

130. 42 U.S.C. §§ 1973aa-2, 1973bb-2 (1970), *as amended*, Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400.

131. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400.

which are particularly well-suited to the three-judge court procedure. The Voting Rights Act seems special principally because the relief sought is of a generalized nature. Thus, the factual issues are likely to involve general statistical studies or regional surveys, rather than particularized facts of individual cases which are so inappropriate for three-judge court determination. In the 1965 Voting Rights Act, the clauses requiring three-judge district courts for the determination of suits brought by the states are either cases where the state seeks a declaratory judgment declaring that a "test or device"[132] has not "been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color,"[133] or they involve cases brought by states seeking a declaratory judgment declaring that a voting "qualification, prerequisite, standard, practice, or procedure" does not have such a purpose.[134] Thus, the determinations do not deal with individual cases.[135]

Similarly, the three-judge court requirements for suits brought by the Attorney General apply to suits seeking general declarations. The Attorney General may bring a suit for declaratory judgments or injunctive relief "against the enforcement of any requirement of the payment of a poll tax,"[136] or he may seek a finding that a deprivation of voting rights was pursuant to "a pattern or practice of discrimination."[137] That the requirement of three-judge courts is restricted to the general situations involving "pattern or practice" becomes apparent from the structure of 42 U.S.C. section 1971. Subsection (c) of that provision deals with the general right of the Attorney General to prevent a person from engaging in an act that deprives another person of the right to vote; subsection (e) permits

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132. Defined in 42 U.S.C. § 1973b(c) (1970), *as amended*, Act of Aug. 6, 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400.

133. 42 U.S.C. § 1973b(a), *as amended*, Act of Aug. 6, 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400 (1970).

134. *Id.* § 1973c; *see* Beer v. United States, 374 F. Supp. 357 (D.D.C. 1974); Harper v. Kleindienst, 362 F. Supp. 742 (D.D.C. 1973) (both showing the limited function of the courts in this respect).

135. *See generally* statement by Attorney General Katzenbach that the case-by-case method of enforcing voting rights has been unsatisfactory, at H.R. REP. No. 439, 89th Cong., 1st Sess. 9-10 (1965).

Perhaps the almost "administrative" or "executive" nature of such declaratory judgments is best exemplified by the Act of Aug. 6, 1975, Pub. L. No. 94-73, § 202, 89 Stat. 400, *amending* 42 U.S.C. § 1973b(b) (1970), which states that the non-permissibility of the tests or devices can be established by a determination of the Attorney General accompanied by a determination of the Director of the Census.

136. 42 U.S.C. § 1973h(b) (1970), *as amended*, Act of Aug. 6, 1975, Pub. L. No. 94-73, § 408, 89 Stat. 400.

137. *Id.* § 1971(g) (Supp. II, 1972).

the Attorney General to request the court to make a finding "whether such deprivation was or is pursuant to a pattern or practice"; and, finally, subsection (g) provides that when such a request has been made, the Attorney General may make a further request for a three-judge court. Clearly, the three-judge court is to be instituted only when the case involves the general finding of "pattern or practice."[138] It would seem that the three-judge court requirements should be retained, although modifications similar to those of the Antitrust Procedures and Penalties Act of 1974 might be suggested.[139]

The three-judge requirement in another special statute, the Presidential Election Campaign Fund Act of 1971,[140] may lend itself more clearly to modification along the lines adopted by the Antitrust Procedures and Penalties Act of 1974. Under present law, determinations made by the Comptroller General in a factually difficult context under the 1971 Act[141] are subject to review by the United States Court of Appeals for the District of Columbia,[142] but suits to implement the statute by the Comptroller General, the national committee of any political party, or individuals eligible to vote for President are to be brought in a three-judge district court.[143] While it may be desirable not to force individuals, who may be located anywhere in the country, into a District of Columbia court, it is questionable whether a three-judge court is the desirable forum. Implementation of a determination by the Comptroller General potentially involves many factual details and issues; hence, a single-judge proceeding might be preferable. The obvious political character of decisions implementing the Presidential Election Campaign Fund Act by enforcing the Comptroller General's determinations, and especially the frequent need for urgent action in such cases, may make early Supreme Court review very desirable. Adoption of a procedure like the new appeal provision of the Antitrust Procedures and Penalties Act of 1974[144] may be suggested, perhaps with

138. The three-judge court provisions of the 1970 Voting Rights Act include suits by the Attorney General challenging a "test or device" as a violation of the constitutional right to vote, 42 U.S.C. § 1973aa-2 (1970), or challenging a denial of the right of 18-year-olds to vote. Act of Aug. 6, 1975, Pub. L. No. 94-73, § 301, 89 Stat. 400, *amending* 42 U.S.C. § 1973bb (1970).

139. See notes 70-106 *supra* and accompanying text.

140. 26 U.S.C. § 9011(b)(2) (Supp. II, 1972).

141. *See* 26 U.S.C. §§ 9003, 9005 (Supp. II, 1972) (conditions for payments to candidates); *id.* § 9004 (detailed rules for the entitlement of eligible candidates to payments).

142. *Id.* § 9011(a).

143. *Id.* § 9011(b)(2).

144. 15 U.S.C.A. § 29(b) (Supp. I, 1975); see notes 70-106 *supra* and accompanying text.

an exhortation that the urgency of the matter shall be a factor in favor of having the Supreme Court decide the appeal immediately.

Finally, there are some three-judge court provisions in the civil rights field contained in the chapters on Public Accommodations and Equal Employment Opportunities.[145] While to some extent their language is similar to the Voting Rights Act provisions discussed in the preceding pages,[146] there remain substantial differences which may justify retention of the three-judge procedure in voting rights cases but may tend to suggest its abolition in the civil rights field. The first of the civil rights provisions prohibits discrimination or segregation in places of public accommodation on the ground of race, color, religion, or national origin;[147] the other provision requires that equal employment opportunities be maintained.[148] In both situations the Attorney General is authorized to bring an injunction suit against any "person" engaged in a "pattern or practice of resistance" to the guaranteed rights.[149] Together with a certificate that the case is of "general public importance" the Attorney General may then demand a three-judge court.[150]

These provisions in the civil rights field seem very similar to the procedure that existed in the antitrust area prior to the December 1974 amendment;[151] and a similar abolition of the three-judge requirement, would appear to be desirable. The awkwardness inherent in a three-judge procedure is not justified by the fact that the Attorney General certifies that the case is of "general public importance." And here the finding of a "pattern or practice" does not, as it does in the voting rights field, imply a generalized statistical finding more readily suited to a three-judge procedure. For in the voting rights field it was the "pattern or practice" of the *state* that was in question,[152] whereas in the public accommodations and equal employment sections of the civil rights area, it is a *person's* "pattern or practice" of *resistance* to the guaranteed rights that is being litigated.[153] It is much more likely that the latter area will contain individualized factual situations inappropriate for three-judge courts. Accordingly, adoption of a procedure patterned after

145. 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (1970).

146. The civil rights provisions also talk about "pattern or practice." See notes 133-44 *supra* and accompanying text.

147. 42 U.S.C. § 2000a (1970).

148. *Id.* § 2000e-2(a).

149. *Id.* §§ 2000a-5(a), 2000e-6(a).

150. *Id.* §§ 2000a-5(b), 2000e-6(b).

151. See notes 62-106 *supra* and accompanying text.

152. *See* 42 U.S.C. § 1971(g) (1970) (*e.g.*, literary tests or general voting qualifications).

153. *See* 42 U.S.C. §§ 2000a-5(a), 2000a-6(a) (1970).

the Antitrust Procedures and Penalties Act of December 1974, together with the special appeal procedure to the Supreme Court,[154] clearly seems appropriate in the public accommodations and equal employment fields.

Turning back to the general statutes requiring three-judge courts —28 U.S.C. section 2281 (injunction against state statute on ground of unconstitutionality by restraining action of official) and section 2282 (injunction against federal statute on ground of unconstitutionality) —it should be noted that the Study would do away with section 2282.[155] But while the Burdick amendment to the Federal Court Jurisdiction Act, based on the Study, would also abolish section 2281, it would retain the three-judge court requirement for both federal and state reapportionment cases.[156] While reapportionment cases because of their generalized, statistical facts, might tend to justify convening a three-judge district court, the awkwardness of a three-judge court procedure in the lower courts cannot be denied even for reapportionment cases. Instead of resorting to a three-judge court, perhaps the establishment of a single-judge system and a qualified immediate appeal to the Supreme Court might be the desirable solution.

Legislative steps abolishing the special statutory three-judge court requirements may be expected, and legislative rethinking of the general rules requiring three-judge courts may be desirable. Such "organizational" changes[157] in federal jurisdiction perhaps will be

154. *See* notes 72-76 *supra.*

155. STUDY 611.

156. *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess., at 748 (1972).

157. Another "organizational" change which may soon be promulgated is "geographical" legislation recommended by the U.S. Commission on Revision of the Federal Court Appellate System. U.S. COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROVISIONS (1975). In view of the unbearable burden of the caseload in the Ninth Circuit, the Commission at one point suggested dividing the Ninth Circuit into two circuits, thereby splitting the State of California into two separate circuits. *Id.* at 96. Aside from other problems, such a solution might result in an increased Supreme Court workload. For instance, under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970), whether an employee was acting "within the scope of his office or employment," 28 U.S.C. § 2671 (1970), has been interpreted to be a matter of state law, and even whether a soldier in any situation was acting in the line of duty is to be determined by the applicable rules of *respondeat superior* under state law. Williams v. United States, 350 U.S. 857 (1955). The result of that ruling is to limit substantially the number of successful certioraris in the Federal Tort Claims field. *Compare* Williams v. United States, 215 F.2d 800 (9th Cir. 1954), *rev'd and remanded*, 350 U.S. 857 (1955) (decision before Supreme Court ruling), *with* Williams v. United States, 248 F.2d 492 (9th Cir. 1957), *cert. denied*, 355 U.S. 953 (1958) (decision after Supreme Court ruling). If the State of California were divided into two separate circuits, the likelihood of successful certioraris on the basis of conflicting rulings on state law

promulgated before important "substantive" changes will be enacted. In fact, whenever the question of the public importance and the viability of a three-judge court system appears in the future, legislators are well-advised to appreciate fully the fact that situations dominated by complicated issues of individualized facts are particularly ill-suited for three-judge courts. The goal of an early Supreme Court ruling in those situations might be accomplished by legislation modeled after the new provisions of the Antitrust Procedures and Penalties Act of 1974.

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applicable in the interpretation of a federal statute might increase. *See* SUP. CT. R. 19.1(b) (conflict between court of appeals' decisions on the same matter specifically listed as the first reason for granting certiorari).